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NO. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO; JOSE RAMON GONZALEZ, INDIVIDUALLY, AND AS PRESIDENT OF THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO; JUAN AGOSTO ALICEA, FRANCISCO DE JESUS TORO, ANTONIO J. COLORADO, RUBEN VELEZ LEBRON, GILDO MASSO, EDUARDO ROVIRA AND DIEGO SUAREZ, EACH INDIVIDUALLY, AND AS MEMBERS OF THE BOARD OF DIRECTORS OF THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO,

Petitioners,

v.

ZAIDA LYDIA DE CHOUDENS,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPPOSITION TO THE GRANT OF PETITION FOR CERTIORARI

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March 4, 1987

PUBLISHING RESOURCES, INC. SAN JUAN, PUERTO RICO

QUESTION PRESENTED

Whether a Senior Vice President, Finance Area of the Government Development Bank for Puerto Rico, whose demotion was found to be politically motivated and impermissible under the *Elrod-Branti* standard justifying the issuance of a preliminary injunction, which was, in turn, affirmed by a unanimous Court of Appeals, justifies this Court's intervention under either its inherent supervisory power or on an alleged, but unsubstantiated, conflict among the Circuits?

PARTIES TO THE PROCEEDINGS BELOW

The Respondent herein and the conjugal partnership of Zaida Lydia De Choudens and Miguel A. Marrero were the plaintiffs before the District Court for the District of Puerto Rico and plaintiffs-appellees before the Court of Appeals for the First Circuit. Respondent is the party in interest as to the relief afforded below. Besides the petitioners, there were two other defendants before the District Court, who were defendants-appellants before the Court of Appeals: José Ramón Oyola, the previous President of the Government Development Bank for Puerto Rico, and Manuel García Méndez, a former member of its Board of Directors. Since they were replaced, respectively, by petitioners José Ramón González and Gildo Massó, they are not affected by the preliminary injunction granted by the District Court and affirmed by the Court of Appeals, although they remain as defendants below for purposes of plaintiffs' untried claim for damages.

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NO. 86-

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 801 F.2d 5 (1st Cir. 1986). That decision must be read in conjunction with *Jiménez Fuentes* v. *Torres Gaztambide*, 807 F.2d (1st Cir. 1986). The opinion of the District Court, not yet reported, appears together with the other cases in Petitioner's Appendix.

JURISDICTION

Jurisdiction was properly invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides that:

> "Congress shall make no law abridging the freedom of speech...or the right of the people peacefully to assumble...".

The First Amendment applies to the Commonwealth of Puerto Rico either directly or through the Fourteenth Amendment.

COUNTER STATEMENT OF THE CASE

The issue in this case is whether a member of the Popular Democratic Party, regardless of experience, makes a better operations manager of a Bank (Senior, Vice President, Area of Finance), than does a member of the New Progressive Party, with more than twenty (20) years of banking experience in every facet of the Bank's operation. Zaida Lydia De Choudens moved step by step from the lowest echelon of the Government Development Bank for Puerto Rico to become Controller. Then, upon the recommendation of a Popular Democrat, Senior Vice President of the Bank, she was named as his successor to the position now

known as Senior Vice President, Area of Finance. (A13-15.) Her job is an important one and she has discretion in implementing orders within the area of her responsibility. She establishes no political policy, though. The goals and utilization of the Government Development Bank are set by the Governor of Puerto Rico and the Legislature. Following the election mandate, a Board of Directors sets the policy of the Bank, even within a narrow range, and there is a more limited range of interpretation by the Bank President, a Gubernatorial nominee. The President, in turn, names an Executive Vice President.

Excluding the New York Office, the subsidiaries and affiliates and the staff support for the President, at the fourth tier of the Bank's hierarchy are the Senior Vice Presidents. The immediate former president of the Bank, Julio Pietrantoni, who was not even of the same political faith as the Governor who appointed him, denied that the Respondent had policymaking power. She had ample decision-making power commensurate with her responsibility, he admitted. This testimony then ensued:

Q: Did this authority, and the ability to make decisions also carry with it the right to make policy for the bank?
A: No, sir.

Q: How is policy at the bank made?
A: I think that a lot of it rests on the president of the bank with a great input from the Board and a much greater input from the leadership of the Administration, at the time, in power.

Q: And what is the policy of the bank and how does it change?
A: Well, the policy of the bank is like, which talk about setting policy, you mean where are we going, what are we going to do with regards to a particular area. I would say that whoever sets the policy is the guy who sets the course, if we were a ship, the guy who decides due north or due south, whoever sets the course, that is the guy that makes the policy. He gets a lot of input from the navigator, or from the lawyers and economists, but he tells everybody else that he

> is setting the course, and everybody else within his own realm - does his work to follow that course.
>
> Now, when the head of the ship or the head of the bank sets the course, he must, he does that, some things on his own, other things with the input of the Board and other things with the input of the Administration. Sometimes he sets the course because he really doesn't set the course, he just tells the director, but somebody else is setting the course with higher decisions that are made by Legislators, by setting up a law that you might be totally opposed to or the Finance Counsel or the Governor, or sets up a policy that the government must follow.
>
> So there, sometimes the President of the bank is not always setting the course, he is just passing on what the legal system of the, or the power system that requires him to do (T27-28).

Respondent made recommendations about improving the work of her area, which were sent through channels to the Board. He flatly stated that political affiliation was not a requirement for that job (T81). Mr. Pietrantoni's predecessor, Mariano Mier, who appointed her to the position from which she was demoted was asked:

Q: Did her political affiliation play any role in your appointment of her?
A: Not in my mind, no.
Q: Why not?
A: Because I considered GDB a very professional institution, I wasn't looking for her political affiliation, I was looking for competence (T484).

Then he was asked:
Q: Did she make many decisions?
A: She was in charge of the administrative area, on that side she made decisions.

Q: Did she make any policy for the bank?
A: No (T484).

Mr. Mier also testified that he knew that Mrs. De Choudens' predecessor was a member of the Popular Democratic Party and he had delegated to him all the authority that Mrs. De Choudens had. At no time did he ever consider that the predecessor, Mr. Doble, was making Bank policy (T514-18).

The Executive Vice President, who was fired when Respondent, Zaida Lydia De Choudens was demoted, was questioned about why she was named interim President. He replied:

A: Because she was basically the one that was named and given that responsibility, not because of seniority or any other reason. I would suspect, I wasn't the one that took that decision, but she probably had more knowledge of everything that was going on in the bank, than any other specific senior vice president. Meaning that there is a senior vice President in New York, he only knew about what was going on in New York, he didn't know anything about the bank. There was a senior vice president who knew about economy, but he didn't know how to economize the bank. Then there was the senior vice president in charge of the private lending side, he knew about private lending, but didn't get involved in other things. Zaida was the person that had the general knowledge of what was going on in the bank (T105).

He, too, denied that she had a policymaking role (T116). He also flatly denied that political affilition was a requirement for the job and pointed out that most of management was of the opposite political faith immediately before the 1984 elections.

The Respondent testified about her discretion and authority within the areas of her responsibiity and that she was responsible for the input into the bank's operational budget from her area. She made recommendations for improvements, many of which were accepted, others were not. When she was promoted from Control-

ler to Senior Vice President, she recommended that her former job be filled by Sarah Rodríguez, a member of the opposite, Popular Democratic Party, because she thought Sarah to be the person best qualified (T259-60). Her predecessor, Mr. Gustavo Doble, was hired by her as a consultant on two occasions before her demotion, although she well knew that he, too, was a "Popular" (T260). Her successor, the same Sarah Rodríguez, denied that her duties as Senior Vice President of the Area of Finance depended, in any way, upon party affiliation (T325).

Mr. Doble, the Respondent's predecessor recommended the Respondent to be controller because he felt she could do the job (T330) and that the performance of the job was without any regard to political affiliation (T351). Finally, José Ramón Oyola, who was the new President, the one who demoted her, denied that he even knew her political affiliation. He did not think the position of Mrs. De Choudens required any particular political affiliation, but only a similarity of policy views toward accounting systems, but confessed that he didn't have any ideas as to Respondent's views (T597).

Thus, when the Petition speaks about a top-ranking government official like the Respondent, it is an overstatement of the record, albeit the phrase does appear toward the end of the Court of Appeals' opinion. The district Judge, Carmen Cerezo, stated, "We have no quarrel with their [defendants'] contention that Mrs. De Choudens is a policymaker and has access to confidential information within the bank" (A26). That statement must be read in the context of what the Judge found as to the scope of this policy. Those duties were delineated at A25 and the policy was not political policy but the internal policy in her areas of responsibility. When she spoke for the Bank, she expressed the Bank's official point of view, never her own. She was not a creator of the public policy of the Bank. That was the function of the Board and the President within the narrow areas left open by the pronouncements of policy of the Governor and the Legislature.

The opinion of Judge Coffin, speaking for a unanimous Court of Appeals, defined the case of Respondent, as:

> "...[A] staff official who, while indubitably in a policymaking, confidential, and communicative position, is both empowered and constrained by the limits of her specialized functions...." (A7) and,

> "...[W]hile these responsibilities signify a position of substance of valued policy contributions, recommendations, and advice, they involve policially-neutral, technical, and professional matter. Similarly, though plaintiff was indeed an agency spokesperson, there is no suggestion of any 'party line' or political, goal-oriented message that she ever communicated." (A9)

On the record, this case is as simple as that of the high school football coach hypothesized by Mr. Justice Stevens in *Branti v. Finkel*, 445 U.S. 507 (1980). The Respondent was a 20-year employee who had mastered every aspect of the operations of Government Development Bank for Puerto Rico. The Bank had been run as a business. It was staffed with economists, investment specialists, loan specialists, bond specialists and administrators. At the core, is the Area of Finance. It services the Public Loans, the Private Development Loans, provides the computerized accounting, pre-audits the accounts and services the subsidiaries and affiliates. It requires trained specialists and professionals. Never had it been politicized until the post- election period in 1985. Then, for the first time, every identifiable New Progressive Party member not protected by union membership was fired or demoted, including the Executive Vice President, the Senior Vice President in the Loan Area, the Respondent, the Personnel Director, the head of the Janitorial Service, and two secretaries. With the exception of the Executive Director, the reason for the firing of each was "incompetence." Orchestrating

the *Mt. Healthy - Givham*[1] defense, the new Administration called for a return to an unbridled spoils system. In seeking a rejection of the approach by the Court of Appeals for the First Circuit, the Petitioner is asking this Court to scrap the *Elrod-Branti*[2] approach and to replace the First Amendment Right to free association with the concepts of Boss Tweed.

The Decisions in the Courts Below

In the District Court, Judge Cerezo meticulously dissected the evidence of the *Mt. Healthy* defense and concluded that the Respondent was not worthy of credence (A21). He claimed he never knew the Respondent's political affiliation. It is bizarre to face the powerfully mounted claim that Respondent's position was one for which party affiliation is an appropriate requirement. Everyone who testified at the trial, including two former Bank Presidents, the former Executive Vice President, Respondent's predecessor (who today is once gain employed at the Bank as Executive Vice President), Respondent's successor, the Personnel Director who handed Respondent the removal letter, and the Petitioner, all testified that political affiliation is not an appropriate requirement for the effective performance of the public office that Respondent held. The trial judge emphasized that the Government has the burden of establishing that political affiliation is an appropriate requirement. It did not. On the basis of the evidence, the Court need not have gone into such depth in the interpretation of the *Branti* mandate. Judge Cerezo's conclusion was that banking operations were not related to partisan political interests, when the job is essentially a provider of accounting services and technical and financial information. As a question of fact, the Petitioner herein failed to meet his threshold burden.

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[1]*Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977); *Givhan v. Western Line Consolidated School*, 439 U.S. 410 (1979).

[2]*Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).

The Court of Appeals wrote two opinions and they must be considered together. In *Jiménez Fuentes v. Torres Gaztambide*, 807 F.2d 236 (1st Cir. 1986) (A32), the plaintiffs were Regional Directors of CRUV (Corporación de Renovación Urbana y Vivienda)[3]. The Appellate Court left undisturbed the District Judge's findings that plaintiffs in that case were transferred for political reasons, or that plaintiffs would not have been transferred but for their political affiliation. But, the Court differed with the trial judge on whether political affiliation is an appropriate requirement for the job. Under the Commonwealth of Puerto Rico's reading of their own Civil Service Law, based in part on the decision of this Court in *Branti*, the same position was determined to be one for which political affiliation was an inappropriate requirement, *Colón v CRUV*, 115 D.P.R. 503 (1984). It relied on *Branti* and *Elrod*, the test being whether the position was a policymaking one. *Branti* departed from the policymaking and confidential labels because they were either underinclusive or overinclusive. There are positions appropriately considered political that are not policymaking and there are policymaking positions where party affiliation is not a relevant consideration. Eschewing the approach of the Supreme Court of Puerto Rico, the majority opinion of the Court of Appeals synthesized its approach in footnote 7:

> "Although *Branti's* requirement that a position relate to 'partisan concerns' at first seems at odds with the use of that term in *Elrod*, the two are consistent. The plurality opinion in *Elrod* states that the political firing can only be justified by governmental interests, not the interests of partisan *organizations*. The Court in *Branti* reaffirms that conclusion, but, in finding *Elrod*'s policymaking and confidential labels overinclusive determined that the positions must relate to 'partisan political con-

[3]Puerto Rico's Housing and Urban Renewal Corporation.

> cerns.' Thus, *Elrod* and *Branti* hold that political firing is constitutional when it serves the interests of the government, not a party organization; it serves a governmental interest when used for policymakers or confidential employees whose work involves issues where there is room for political disagreement on goals or their implementation." (A37)

The Court of Appeals analyzed the case law since *Branti*, and concluded that identifying generic categories of positions where partisan selection and rejection are permissible has proven to be an illusive and intractable task. Nevertheless, it gleaned from the cases the following proposition:

> "...[D]oes the position involve government decision making on issues where there is room for political disagreement on goals or their implementation? Otherwise stated, do party goals or programs affect the direction, pace, or quality of governance?"

In the case of the CRUV Regional Directors, the Court of Appeals found that the providing of housing to low- and middle-income city residents is a vital political issue. It went on to find that the plaintiffs were *alter egos* at the regional level for the Executive Director of CRUV. The need for political loyalty so that the administration could carry out policies sanctioned by the electorate was found to be inherent in these positions.

Judge Aldrich's concurrence can only be classified as a reluctant one. He joined Judge Torruella in criticizing the reliance upon *Tomczak v. City of Chicago*, 765 F.2d 633 (7th Cir. 1985) and felt that the *Branti* views of the Supreme Court were "liberalized," which we read to mean more accommodating to the governmental agency and not to the constitutional rights of the jobholder. Judge Torruella dissented. He felt that the labels of "policymaker" or "confidential" was given much too much importance in view of the *Branti* strictures. Judge Torruella felt that the majority's opinion abrogated the job-holders rights and

opened the floodgates for the swinging of the patronage axe (A60).

In the decision rendered on the instant case on the same day, *De Choudens v. Government Development Bank of Puerto Rico*, 801 F.2d 5 (1st Cir. 1986), a unanimous *En Banc* Court of Appeals found that the job was not one for which political affiliation was an appropriate requirement because she was constrained by the limits of her specialized functions. (A2) On the record, that conclusion was an imperative. The Court had to cut the snares in which it had enveloped itself in the *Jiménez Fuentes* case by placing so much importance on the policymaking label.

The decisions are harmonious. Most recently, the Court of Appeals revisited this issue in *Collazo Rivera v. Torres Gaztambide*, No. 86-1308, 1st. Cir. decided on February 25, 1987. The same dichotomy persists between Judge Torruella and his brethren concerning what is a proper partisan political concern in Puerto Rico.

REASONS FOR NOT GRANTING THE WRIT

I.

THE COURT OF APPEALS PROPERLY APPLIED *BRANTI*.

If the Court of Appeals for the First Circuit can be faulted in any way, it is for enlarging rather than restricting the exception to the Constitutional requirement that public employees cannot be dismissed from their employment because of their political belief. In *Elrod v. Burns*, 427 U.S. 347 (1976), a plurality of this Court, started with the proposition that, "The right to associate with the political party of one's choice is an integral part of this [First Amendment] basic constitutional freedom. *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973)." Mr. Justice Brennan relied upon the decisions in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) which held that political association alone could not, consistently with the First Amendment, constitute an adequate ground for denying public employment. He also relied upon *Perry v. Sin-*

dermann, 408 U.S. 593 (1972) which held that the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially his interest in free speech...." 408, U.S. at 597.

The plurality opinion emphasized that while the right to public employment was not an absolute, encroachment cannot be justified upon a mere showing of legitimate state interest, but that the interest advanced must be paramount, one of vital importance, and the burden is on the Government to show such an interest. 427 U.S. at 367. Policymaking positions were the only positions that ought to give way to the constitutional imperative. 427 U.S. at 367. This opinion recognized that a policymaker was not an easily definable creature. It spoke about the critical nature of the responsibilities and concluded that in the final analysis, "the political loyalty 'justification is a matter of proof, or at least argument, directed at particular kinds of jobs.' *Illinois State Employees Union v. Lewis*, 473 F.2d at 574 ...the burden of establishing this justification as to any particular Respondent will rest on the petitioner on remand, cases of doubt being resolved in favor of Respondent." 427 U.S. at 368. Mr. Justice Stewart and Mr. Justice Blackman concurred and stated that a non-policymaking, non-confidential Government employee could not be discharged from a job he was satisfactorily performing upon the sole ground of his political beliefs.

If no magic is ascribed to the words "policymaking" or "confidential" and the Government is held to its proof, Respondent's position was described by all as important and responsible but without any aspect of public policymaking. Had *Branti* never been decided, on this record, the result would have been the same. The Government never proved that Respondent had any impact on the formulation of public policy other than for professional and technical advice. When the District Court spoke of her policymaking role, it was within the circumscribed area of her administrative authority.

Branti v. Finkel, 445 U.S. 507 (1980) added a new dimension to the issue. The holding was:

> "In sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate the party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518.

On this holding, this case required summary affirmance by the Court of Appeals. The record at trial is devoid of any evidence that demonstrates that political affiliation had anything to do with the Respondent's job. She achieved the position solely on the basis of merit and was recommended for the job by her predecessor, a member of the opposite political party. Every person who testified, and that included the incumbent President of the Bank who fired her, two former Presidents, the former Executive Vice President, her predecessor and successor and the incumbent's personnel chief, asserted that the job she performed did not require any political affiliation with the reigning party.

Nothing was so esoteric about this case that required extensive analysis. It was the "policymaking" and "confidential" labels that had piqued the interest of the Court of Appeals. But, after examining the record, the Court of Appeals applied *Branti*, as this court intended.[4] There is no need to even define "policymaker", after *Branti*. The only inquiry is to look at the Government employee's job and to determine whether the hiring authority has met his heavy burden of showing that political affiliation is needed to do that work. Accounting and fiscal administration plus a comprehensive knowledge of the inner workings of the Government Development Bank in the financial community is not a position that is or should be politicized.

For pages in its Petition, Petitioner argues for the restitution of the label to primary position. Not once does it refer to the record,

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[4]When the District Court and Court of Appeals speak of a high-ranking official in describing plaintiff, they must be considering her salary and her responsibility. She is a virtual unknown, and is inactive politically.

the transcript, or the testimony. It shuns the obvious and subsititutes a series of straw men of what might happen if Respondent wanted to sabotage the operations of the Bank. This Court was not persuaded by such arguments in *Elrod* and it is hardly proper to suggest that a loyal Government employee who has served in both Popular Democratic Party and New Progressive Party administrations for more than two decades, and, has never received an evaluation lower than the highest possible one, would frustate public policy. Not one of the assertions made at pages 16-20 is supported by anything in the record. On the contrary, these questions were asked, and the answers were that she would not (and we suggest, could not) frustate public policy.

Her position is not related to partisan political concerns and the record so substantiates that proposition.

II.

THERE ARE NO CONFLICTING "APPROACHES" AMONG THE SEVERAL COURTS OF APPEALS.

The aftermath of *Branti* reveals a case-by-case application of the test of whether the particular job is one which "ought to" include political affiliation as a requisite. We say "ought to", because in most instance the hiring authority would like to create, like here, a new concept of each job and thereby expand the *Elrod-Branti* exception. Without any claims of being exhaustive, a review of the cases cited by the Petitioner and by the Court of Appeals for the First Circuit is illustrative. The first question is whether the issue of whether the job is one for which political affiliation is a reasonable requirement is a factual one or a legal one. Here, the approaches do differ with some courts holding that the dispute may involve a fact issue, others say it involves an ultimate legal question, and others find grey areas between the two extremes. In most cases, the factual determination as to the nature of the specific job will resolve the issue.

Horton v. Taylor, 767 F.2d 471 (8th Cir. 1985) presents a hotly contested issue of whether road-graders in a small rural area of

Arkansas held jobs that encompassed the necessity for party affiliation. Merely stating the issue should cause some degree of shock because it is hard to conceive of a job with less need for party affiliation. Yet, the spoils system was so ingrained that road-graders won and lost their jobs every two years as the political control wavered between one or the other political party. Because the district judge did not find any factual basis for the proposition as to whether the road-graders' jobs required political affiliation, but dismissed the petition on account of a non-existent "small county" exception to the rule, the Court of Appeals for the Eighth Circuit reversed, as a matter of law. It remanded the case for further findings.

In *Grossart v. Dinaso*, 758 F.2d 1221 (7th Cir. 1985) the District judge found that the plaintiff, a bookkeeper, could not be terminated for political reasons, but he concluded that the reasons for her firing were dissatisfaction with her, personally. The Court of Appeals for the Seventh Circuit, ignoring the *Branti* stricture, started with an inquiry as to whether the dismissed employee was a policymaker. It finally agreed she was not. The case is troublesome because as the dissenter, Judge Posner, finds the cause of her firing was most probably politically motivated and impermissible. The unfortunate turn of the case and the exaggerated importance of the labels, notwithstanding, the *Branti* application to the job was appropriate. In the context of the relative political import of their positions, no one can gainsay that Mrs. Grossart's bookkeeper position was more politically influential the Mrs. De Choudens'. The litmus test of *Branti*, together with the high burden imposed on the hiring authority, indicates that neither position appropriately required political affiliation.

Barnes v. Bosley, 745 F.2d 501 (8th Cir. 1984) represents a straightforward affirmance of findings of political firing and an analysis that the jobs were not ones for which political affiliation was appropriate. The only difference between these successful plaintiffs who were assistant court clerks and the instant case is that these clerks originally received their positions as the result of patronage, whereas the Respondent herein competitively obtained her first position, and every subsequent position in the Bank, was earned on the basis of merit.

The Fourth Circuit Court of Appeals found that under the *Branti* test, as a matter of law, the duties of a deputy sheriff, no matter what the size of the office, or the specific position of power involved, or the customary intimacy of associations within the office, or the need for mutual trust and confidence did not involve a position related to partisan political interests. *Jones v. Dodson*, 727 F.2d 1329, 1338 (4th Cir. 1984). The case was remanded for further jury findings with Judge Fairchild dissenting in favor of entry of judgment as in the verdict.

What the Petitioner emphasizes, "footdragging," or "leaks" or "potential for disruption" are not proper inquiries under the *Branti* or *Elrod* tests. Poor or disobedient performance can always be rectified. What we have in the case at bar is an unabashed instance of political firing - a wholesale evacuation of all members of the opposing party not protected by union membership.

After this the Bank made a *post-hoc* attempt to change the job concept into something that had never before existed. In *Meeks v. Grimes*, 779 F.2d 417 (7th Cir. 1985) the Court reversed a decision upholding the firing of bailiffs. In *Tomczak v. City of Chicago*, 765 F.2d 633 (7th Cir. 1985) the Seventh Circuit iterated its earlier view that its formulation of the test in *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981) cert. denied 455 U.S. 1021 (1982) was proper. In that latter case the Seventh Circuit adopted this formulation: "The test is whether the position held by the individual authorized, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation." 653 F.2d 15 1170.

Petitioner contends that the Court of Appeals for the First Circuit did not follow that test. That is because the Petitioner semantically extends disagreements on goals to cover all non-partisan as well as politically partisan goals. He would have the Court endorse his power to fire all persons suspected of being non-members of the Popular Democratic Party, if their jobs were as engineers, accountants, word-processors because they have "either directly or indirectly, meaningful input...." That issue was covered in the trial and it became apparent that plaintiff's

input was considerable in the professional and technical sense, but nil insofar as partisan goals were involved. In *Tomczak*, the First Deputy Commissioner of the Water Department was fired for political reasons. The District Court found that the decision-making authority of *Tomczak*, while considerable, was not in areas where there could be principled disagreements about goals or their implementation. The Court of Appeals disagreed. In reversing, it found the position filled with power and authority and with the power to make policy. While paying homage to *Branti*, the Court of Appeals seems to sound more like *Elrod*. *See also, Shakman v. Democratic Organization of Cook County*, 722 F.2d 1307 (7th Cir.) *cert. denied, sub. non Lindsey v Kelly*, 464 U.S. 916 (1983).

As in *Shakman*, a District Court found that the chief deputy commissioner of parks in New York functioned as a full-time political operative and was exempt, *Ecker v. Cohalan*, 542 F. Supp. 896 (E.D. N.Y. 1982). The cases from the Third Circuit were all predictable. City solicitors, assistant prosecutors and speechwriters are all positions for which political affiliation is a must. *See, Ness v. Marshall*, 660 F.2d 517 (3rd Cir. 1981); *Mummau v. Ranck*, 531 F. Supp. 402 (E.D. Pa.) aff'd 687 F.2d 9 (3rd Cir. 1982) (per curiam); *Brown v. Trench*, 787 F.2d. 167 (3rd Cir. 1986). While most of Brown's duties were clerical or technical, her principal duty was to act as a spokesperson for the County Commissioners, and that was one duty which could not be performed except by someone who shared the Commissioners' politically partisan views. The Respondent herein had no comparable obligations.

In every case where the employee was not found subject to dismissal under *Elrod* and *Branti*, the courts weighed the factors and applied a balancing test. The titles for the positions are unimportant because similar titles may fall within the patronage exception if the duties required political affiliation. According to the analysis[5] made in *Brown v. Trench*, the key factor was whether

[5]*Gibbons v. Bond*, 523 F. Supp. 843 (W.D. Mo. 1981) aff'd 668 F.2d 967 (8th Cir. 1982) (branch manager of state Department of Revenue); *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981), cert. denied 456 U.S. 925 (1982).

the employee has "'meaningful input into decision making concerning the nature and scope of a major township program.' *Nekolny*, 653 F.2d at 1170." In *Visser v. Mangarelli*, 530 F. Supp. 1165 (N.D. N.Y. 1982) the trial judge followed *Branti*, albeit a proponent of the views of the dissent. He was unconvinced that the First Amendment should protect public employees who obtain their positions in the patronage system.

A fortiori, persons who obtained their positions on merit and without regard to patronage, like the Respondent in the case at bar, should have more protection. This, however, is not the test. The test should be as stated in *Branti*, and the District Court did so apply it in *Visser*.

Petitioner contends that the First Circuit has applied criteria different from the decisions in the Seventh Circuit, which he apparently likes. Petitioner is result oriented. The simple truth is that the First Circuit has followed the Seventh's narrow reading of *Branti*. Labels are still important in the approach of both Courts. It is conceded that the First Circuit decided *Jiménez Fuentes* contrary to the way that case would have been decided in the Commonwealth courts. It held that the federal test was not as loose as Puerto Rico's. The "confusion," "widespread problems of interpretation," "judicial doubt" are signal reaction words employed by Petitioner to describe the results. There are cases that seem incongruent if we applied generic terms to the positions and there are cases where reasonable minds will differ, viz the lower court and appellate decisions in *Tomczak*, or the decisions in *Jimenez-Fuentes*, itself[6].

(deputy sheriff); *De La Cruz v. Pruitt*, 590 F. Supp. 1296 (N.D. Ind. 1984) (supervisor of county branch of Auditor's office; *Gannon v. Daley*, 561 F. Supp. 1377 (N.D. Ill. 1983) (administrative assistant to State's Attorney of Cook County); *Crisp v. Bond*, 536 F. Supp. 137 (W.D. Mo. 1982) (assistant director of Division of Motor Vehicles); *Visser v. Magnarelli*, 530 F. Supp. 1165 (N.D. N.Y. 1982) (city clerk).

[6]The importance of the two analogous cases that arose under federal patronage rather than state patronage were very influential in the Court of Appeal's decision: *Committee To Protect the First Amendment Rights of Employees of The Department of Agriculture v. Bergland*, 626 F.2d 875 (D.C. Cir. 1979) (pre *Banti*) and *Brunton v. United States*, 518 F. Supp. 223 (S.D. Ohio 1981).

The decisions, on the whole, are much less protective of the First Amendment rights than one would expect after reading *Branti*. The area of protected patronage is still extremely broad. The Petitioner would broaden the exception to include anyone "who may obstruct the policies of the new administration." It would paint with that broad brush even though it has not one iota of evidence to support that paranoia. Respectfully, a constitutional balancing of rights involves the weighing of measurable factors, not invective.

CONCLUSION

The Court of Appeals and the District Court for the District of Puerto Rico studiously followed this Court's teachings in *Elrod* and *Branti*. A review of the decisions across the country does not reveal any of the alleged widespread problems in applying the *Elrod-Branti* test. Generic classification may be impossible because a deputy sheriff in Oklahoma may hold a completely different kind of position than a deputy sheriff in New Hampshire. There are federal judges who do not like the *Branti* rule and would prefer a different standard. Federal judges do, however, follow *stare decisis*, and do not flaunt the dictates of this Court. Case by case development has shown that *Elrod-Branti* is a workable standard. Each case must rest on its individual record and not the imprecations of counsel. Certiorari is not warranted.

Respectfully submitted.

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